In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 354

THE UNITED STATES OF AMERICA, APPELLANT

v.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION, ET AL

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this case on August 5, 1943. A petition for appeal was filed on August 30th, 1943, and is presented to the District Court herewith, to wit, on the 30th day of August 1943.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in

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this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C. sec. 682, commonly known as the Criminal Appeals Act, and by 28 U. S. C., sec. 345.

STATUTE INVOLVED

The pertinent provisions of Sections 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. secs. 1 and 2, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

THE ISSUES AND THE RULING BELOW

The indictment is in two counts. The first count charges a violation of Section 1, and the second count a violation of Section 2, of the Sher-

man Act. The defendants are South-Eastern Underwriters Association (referred to as SEUA), an unincorporated association composed of stock fire insurance companies doing business in Alabama, Florida, Virginia, North Carolina, South Carolina, and Georgia; nearly 200 stock fire insurance companies which are members of SEUA; and 27 individuals who are officers or members of the executive committee of SEUA.

The first count, prior to the charge of conspiracy, makes the following allegations, which are realleged and incorporated in count two (par. 27):

Insurance companies do business both through brokers and local agents (par. 16). The local agents, who are usually compensated on a commission basis and may represent more than one company (par. 9), accept or refuse "offers" for insurance, issue policies on forms supplied by the company, mail daily reports to the company, collect premiums, adjust certain losses, send the company monthly statements of their accounts and pay the company within a stipulated time the balance thereby shown due (par. 18). They are supervised by general agents of the appointing company or by its field men or other employees and officers (par. 18). On policies written by an agent, the company accepts the policy or orders it cancelled as it deems fit (par. 16). After a loss occurs and it has been adjusted, the company mails the local agent a check or draft for delivery to the policyholder (par. 18).

Fire insurance coverage "is essential to and directly affects the flow of interstate commerce" (par. 15). It affords necessary protection against the risk of certain kinds of losses to goods, valued in the billions, constantly moving in interstate commerce (par. 15). The property insured by the defendant companies includes steamboats, shipyards, warehouses and terminals, railroad equipment and rolling stock, and goods of all kinds carried in interstate and foreign commerce (par. 13). The premiums collected by stock fire insurance companies in SEUA States exceeded $52,000,000 in 1941, of which about 90% was collected by the defendant companies (par. 13). Of the nearly 200 defendant fire insurance companies, only 18 have their principal or home offices in SEUA States (par. 19).

SEUA maintains inspection and rating bureaus in each of the SEUA States except Virginia (par. 20). These bureaus examine daily reports submitted by agents of the defendant companies for the purpose of enforcing conformity to the rates, forms, rules and regulations prescribed by SEUA (par. 12).

Count one charges a conspiracy to fix and maintain arbitrary and noncompetitive rates in fire insurance sold by the defendants in SEUA States and count two charges a conspiracy to monopolize trade and commerce in fire insurance in these States (pars. 21, 28). Each count charges that

the conspiracy has consisted in a continuing agreement and concert of action to sell insurance, and to pay commissions to agents, at rates established and fixed by SEUA; to adhere to standard terms, conditions and clauses relating to coverage of risks established by SEUA; to withdraw reinsurance facilities from fire insurance companies not members of SEUA; to withdraw from any agency representing any such nonmember; to boycott persons purchasing insurance from nonmembers; and to maintain inspection and rating bureaus to police and further the foregoing agreements and practices (pars. 22, 29).

There are adequate allegations as to jurisdiction and venue in each count (pars. 25, 32).

The defendants all joined in a single demurrer upon the ground, among others, that the "business of fire insurance is not commerce" and that the charges laid in the indictment therefore do not come within the Sherman Act.[1] The court, in sustaining the demurrer upon this ground, said that the issue was not whether "Congress had power to regulate the insurance companies or some phases of their activities, but rather whether Congress did so by the Sherman Act." It said that

[1] Two other grounds of demurrer, upon which the district court did not rule, were that the interpretation of the Sherman Act upon which the indictment is based violates rights reserved to the States by the Tenth Amendment and that the indictment fails to apprise the defendants of the nature of the offenses charged, in violation of the Fifth and Sixth Amendments.

the Supreme Court had repeatedly held "that the business of insurance is not commerce, either intrastate or interstate" and that "the finding by the Supreme Court that the business of insurance is not commerce, seems to me to demand the finding that the business of insurance is not 'interstate trade' and is not covered by the Sherman Act." The court also said:

> Counsel for the Government concede that in the numerous decisions cited the Supreme Court has held that the business of insurance is not commerce, yet, strangely enough, ask this Court to rule directly to the contrary. Of course the Supreme Court decisions must be followed by this Court. The indictment does not disclose any facts or differences in this case which would remove it from the controlling effect of the decisions of the Supreme Court holding that the business of insurance is not commerce.

The sole basis for the ruling of the district court was that the business of fire insurance is not "trade or commerce" within the meaning of the Sherman Act. The court did not, as an additional or subsidiary ground of decision, hold that if this business is trade or commerce within the Sherman Act when carried on across State lines, the indictment was nevertheless insufficient because it failed to show that the trade or commerce which the defendants were charged with restraining and monopolizing was interstate. Cf. *United States* v. *Swift & Co.*, 318 U. S. 442. It is there-

fore clear that the decision of the district court is based upon a construction of the Sherman Act and that there is a direct appeal to this Court under the Criminal Appeals Act. *United States v. Patten*, 226 U. S. 525; *United States v. Borden Co.*, 308 U. S. 188.

THE QUESTION IS SUBSTANTIAL

We submit that the district court misapplied the holdings in the insurance cases. These cases all involved the validity of State regulation or taxation of insurance companies. The decision in each case was that the State legislation was not such an exercise of control over, or an imposition of burdens upon, interstate commerce as to be an assumption of power over interstate commerce prohibited by the Commerce Clause. But decisions upholding State regulation or taxation against the contention that it unconstitutionally trenches upon the power over interstate commerce reserved to the national Government do not mark the limits of the power of Congress under the Commerce Clause (*Swift & Co. v. United States*, 196 U. S. 375, 400; *Stafford v. Wallace*, 258 U. S. 495, 525) or the limits of what is commerce within that Clause (*South Carolina State Highway Dept. v. Barnwell Bros. Inc.*, 303 U. S. 177).

This Court has recently pointed out that many of the prior decisions dealing with the Commerce Clause are to be interpreted in the light of the

fact that their point of departure was, in a sense, one-sided. In *Wickard* v. *Filburn*, 317 U. S. 111, 121, the Court said:

> For nearly a century, however, decisions of this Court under the Commerce Clause dealt * * * almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period * * * the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference * * * was often some concept of sovereignty thought to be implicit in the status of statehood.

The bearing of the above quotation on the insurance cases is shown by the leading decision in this field since *Paul* v. *Virginia*, 8 Wall. 168. In *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 509, the Court said:

> We have already pointed out that if insurance is commerce and becomes interstate commerce whenever it is between citizens of different States, then all control over it is taken from the States and legislative regulations which this court has heretofore sustained must be declared invalid.

The fears thus expressed as to the effect upon State legislation of a holding that the business of insurance is commerce or interstate commerce

must, in the light of later decisions, be regarded as unfounded. *South Carolina State Highway Department* v. *Barnwell Bros., Inc., supra; Western Livestock* v. *Bureau of Revenue*, 303 U. S. 250.

If attention is directed to the question of what is "commerce" apart from what is commerce among the States, we see no reason in principle why a contract for the sale of goods should be commerce and a contract for the sale of a service should not be commerce. The business of Group Health Association consisted in making and carrying out agreements to provide medical services and hospitalization in return for monthly advance payments. This Court had no difficulty in determining that its business was "trade or commerce" within Section 3 of the Sherman Act. *American Medical Ass'n* v. *United States*, 317 U. S. 519. The business of cleaning and dyeing clothes does not involve the sale of a commodity. It is a service, performed for a charge, but an agreement to fix prices for such service is a restraint of trade or commerce within Section 3. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427. Moreover, it is settled today that the "commerce" of the Commerce Clause covers every kind of interstate communication or commercial intercourse and is not confined to the interstate movement of persons or commodities. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103;

Fisher's Blend Station v. *Tax Commission*, 297 U. S. 650.

If, as indicated above, providing the service of fire insurance is commerce, the commerce which the defendants are charged with restraining is commerce among the States. To restrain competition in the fire insurance business is to restrain not merely the writing of the contract of fire insurance itself but also those acts performance of which is required by the contract. The essential acts so required are payment of the loss by the insurance company if a loss occurs and, on the part of the insured, payment of the agreed premiums. Under the allegations of the indictment (par. 18), the insurance company pays the loss by check or draft sent to the insured and the premiums paid by the insured are transmitted, through agents, to the insurance company. Such payments, involving a regular flow of funds in large amounts across State lines,[2] are, we submit, clearly interstate commerce. *National Labor Relations Board* v. *Bank of America Nat. Trust & Savings Ass'n*, 130 F. (2d) 624, 626 (C. C. A. 9), certiorari denied, April 19, 1943 (Nos. 758, 759, October Term 1942).

The National Labor Relations Act has been held to apply to the employees of a life insurance company, both on the ground that such a com-

[2] The indictment shows (par. 19) that over 90% of the defendant insurance companies have their principal offices outside SEUA territory.

pany is "engaged in interstate commerce" and on the ground that a dispute between it and its employees would affect interstate commerce (*Polish National Alliance* v. *National Labor Relations Board* (C. C. A. 7, 6/5/43)), petition for certiorari pending, No. 226, this Term.[3]

Furthermore, the indictment alleges that the business of the defendants includes writing fire insurance on goods moving in interstate and foreign commerce. Protection of property, by insurance, against the risk of loss by fire and other like causes is universally deemed essential to the carrying on of commerce. Fire insurance policies on goods moving interstate are therefore an instrumentality of interstate commerce just as a bill of lading issued on such goods is an instrumentality of interstate commerce (*United States* v. *Ferger*, 250 U. S. 199). A conspiracy to restrain interstate commerce by monopolizing contracts for the future delivery of a commodity is, because of its necessary effect on interstate commerce, a restraint thereof (*United States* v. *Patten*, 226 U. S. 525). A conspiracy to restrain or to monopolize an instrumentality of interstate commerce must, for a like reason, be deemed a restraint or monopolization of interstate commerce. We submit, therefore, that the indictment

[3] In *Hinkler* v. *83 Maiden Lane Corp.* (S. D. N. Y., 5/14/43), C. C. H. Labor Cases par. 64701, there is a clear-cut dictum that insurance companies are "engaged in interstate commerce."

states a valid cause of action in charging that the defendants' conspiracy to restrain and to monopolize the fire insurance business embraced policies of insurance on goods moving in interstate and foreign commerce.

If the activities which the indictment charges as being violations of the Sherman Act are a restraint or monopolization of "commerce" within the meaning of the Commerce Clause, we submit that they fall within the Sherman Act. That statute, as to the types of restraints to which it applies, was designed to cover the full area of the commerce power of Congress. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495; *Atlantic Cleaners & Dyers, Inc.* v. *United States, supra*, pp. 434–435.

The defendants contended in the district court that a large body of State legislation dealing with insurance companies looks toward rate uniformity and curtailment of competition and is "diametrically opposed to the competitive theory of the Sherman Act."

The legislation referred to merely authorizes the filing of rates with rating bureaus or provides that a company shall not deviate from its filed rates unless notice of deviation is filed with or approved by the State Insurance Department. The Sherman Act would not invalidate legislation authorizing the filing of independently determined rates with a common bureau nor legislation re-

stricting rate deviations by which preference might be given favored customers. See *Parker* v. *Brown*, 317 U. S. 341. The practices charged in the indictment, that the various companies agreed upon uniform rates, are of a totally different character.

We believe that the question presented in this case is substantial and it is plainly one of public importance. The Government has made a general investigation of the practices of fire insurance companies and it contemplates bringing further proceedings under the Sherman Act against other combinations of these companies.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

Filed Aug. 30, 1943.

In the District Court of the United States for the Northern District of Georgia, Atlanta Division

No. 16920—Criminal Action

The United States of America, plaintiff

v.

South-Eastern Underwriters Association, et al, defendants

OPINION ON DEMURRER

On November 20, 1942, an indictment was returned by a Grand Jury of this Court against one hundred and ninety-eight corporations and twenty-seven individuals, charging such corporations and individuals with a conspiracy to fix and maintain arbitrary and non-competitive rates on fire insurance sold by them in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, in violation of Section 1 of the Sherman Anti-Trust Act, 26 Stat. 209, and with a conspiracy to monopolize trade and commerce in fire insurance in said States in violation of Section 2 of the Act.

On January 13, 1943, defendants filed a demurrer challenging the sufficiency of the indict-

ment upon the grounds that, it charges no offense against the United States; that the business of fire insurance is not commerce; that the interpretation of the Act insisted upon would be a violation of the Tenth, Fifth and Sixth Amendments to the Constitution; and that the Court is without jurisdiction of the subject matter of the incident.

The case came on regularly to be heard on the demurrer and was argued orally and subsequently by briefs.

To constitute a violation of the Sherman Act, the restraint and monopoly denounced must be that of interstate trade or commerce, and, unless the restraint and monopoly charged in the indictment be restraint or monopoly of interstate trade or commerce, the indictment must fall.

It is not a question here of whether the defendants participated in some incidental way in interstate commerce or used in some instances the facilities of interstate commerce, but is rather whether the activities complained of as constituting the business of insurance would themselves constitute interstate trade or commerce, and whether defendants' method of conducting same amounted to restraint or monopoly of same. It is not a question as to whether or not Congress had power to regulate the insurance companies or some phases of their activities, but rather whether Congress did do so by the Sherman Act.

Persons may be engaged in interstate commerce, yet, if the restraint or monopoly complained of is not itself a restraint or monopoly of interstate trade or commerce, they may not be convicted of violation of the Sherman Act. The fact that they may use the mails and instrumentalities of interstate commerce and communication, and be subject to Federal regulations relating thereto, would not make applicable the Sherman Act to intrastate commerce or to activities which were not commerce at all.

The whole case, therefore, depends upon the question as to whether or not the business of insurance is interstate trade or commerce, and if so, whether the transactions alleged in the indictment constitute interstate commerce.

The Supreme Court has repeatedly held, during a period of seventy-five years, that the business of insurance is not commerce, either intrastate or interstate. They have done so unequivocally and unambiguously.

Paul v. *Virginia*, 8 Wall. 168;
Hooper v. *California*, 155 U. S. 648;
Noble v. *Mitchell*, 164 U. S. 367;
New York Life Insurance Co. v. *Cravens*, 178 U. S. 389;
New York Life Insurance Co. v. *Deer Lodge County*, 231 U. S. 495;
Bothwell v. *Buckbee, Mears Co.*, 275 U. S. 274;
Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250, 253.

This is not denied by the Government, but it maintains that in some of the cases the ruling was obiter and in others based upon a misconception and failure to comprehend the sweeping scope of the fire insurance business. (Government's Brief, pages 8 & 9). Neither of these positions is sound. In all of the above cited cases, the ruling was essential to the case and the reasoning of the Court showed most careful analysis and full consideration of the questions now raised and did not merely follow "without reconsideration or reason, the fallacy established in the dictum of *Paul* v. *Virginia.*" (Government's Brief, page 15.)

This is especially true in the elaborately argued and thoroughly considered case of *New York Life Insurance Co.* v. *Deer Lodge County, supra.*

The Court could not be clearer in its announcement than in the expressions, "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce," (*Hooper* v. *California,* 155 U. S. 648, 655); and, "Contracts of insurance are not commerce at all, neither state nor interstate." (*New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, 510).

The same reasoning applies to the word "trade" as used in Sections 1 and 2 of the Sherman Act. It has a different significance in Section 3, but this fact does not enlarge its meaning

in Sections 1 and 2. "Section 1 having been passed under the specific power to regulate commerce, its meaning necessarily must be limited by the scope of that power; and it may be that the words 'trade' and 'commerce' are there to be regarded as synonymous. On the other hand, Section 3, so far as it relates exclusively to the District of Columbia, could not have been passed under the power to regulate interstate or foreign commerce, since that provision of the section deals not with such commerce but with restraint of trade purely local in character." (*Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434).

This difference in the meaning of the word "trade" as used in the different sections of the Act is referred to and emphasized in the later cases of *Associated Press* v. *Labor Board,* 301 U. S. 103; *Apex Hosiery Company* v. *Leader,* 310 U. S. 469, and *American Medical Association* v. *United States,* 317 U. S. 519.

Under the extremely broad construction of the words "interstate commerce" by the Supreme Court, which has been so ably presented by counsel for the Government, it is difficult to conceive how the business of insurance could be interstate trade and yet not be interstate commerce. At any rate, the finding by the Supreme Court that the business of insurance is not commerce, seems to me to demand a finding that the business of

insurance is not "interstate trade" and is not covered by the Sherman Act.

In the case of *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, on page 495, the Court says:

> The addition of the words "of commerce among the several states" was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, *Atlantic Cleaners & Dyers* v. *U. S.*, 286 U. S. 427, 434, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce.

The business of insurance is not interstate commerce or interstate trade, though it might be considered a trade subject to local laws, either State or Federal, where the commerce clause is not the authority relied upon. But where the exercise of power is under the commerce clause alone, as in cases under the Sherman Act, the "trade" must have reference to transactions in or which affect interstate commerce.

> This Court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law, although accomplished by means other than contract and which, for consti-

tutional reasons, are confined to transactions in or which affect interstate commerce. (*Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 498).

Here the "trade" pursued, if it be such, is that of conducting the business of insurance, which the Supreme Court has held to be local and not interstate in character.

Counsel for the Government concede that in the numerous decisions cited the Supreme Court has held that the business of insurance is not commerce, yet, strangely enough, ask this Court to rule directly to the contrary. Of course the Supreme Court decisions must be followed by this Court. The indictment does not disclose any facts or differences in this case which would remove it from the controlling effect of the decisions of the Supreme Court holding that the business of insurance is not commerce.

If there is to be any overruling of the long time of clear and thoroughly considered decisions of the Supreme Court, acquiesced in for seventy-five years by Congress and administrative agencies, it will have to be done by the Supreme Court itself, or by Congress.

The conspiracies charged in the indictment are not conspiracies in restraint of or to monopolize interstate trade or commerce. The indictment, therefore, does not charge Federal offenses and should be dismissed.

An order will be passed to accompany this opinion, sustaining the demurrer on Grounds 1, 2 and 5 thereof, and dismissing the indictment.

This 5th day of August 1943.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed in clerk's office at Atlanta, Georgia, August 5, 1943. F. L. Beers, Clerk.

In the District Court of the United States for the Northern District of Georgia, Atlanta Division

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No. 16920—Criminal Action

United States of America

v.

South-Eastern Underwriters Association, et al., defendants

The demurrer in the above case came on to be heard and was argued orally and subsequently by briefs.

After hearing, and upon consideration thereof, Grounds 1, 2 and 5 of the demurrer are sustained, and the indictment is hereby dismissed.

This 5th day of August, 1943.

E. Marvin Underwood,
United States District Judge.

Filed in clerk's office at Atlanta, Georgia, August 5, 1943, F. L. Beers, Clerk.

U. S. GOVERNMENT PRINTING OFFICE, 1943